

**Before the
Federal Communications Commission
Washington, D.C.**

In the Matter of)	
)	
Implementation of Section 304 of the)	CS Docket No. 97-80
Telecommunications Act of 1996)	
)	
Commercial Availability of)	
Navigation Devices)	

**COMMENTS OF
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

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The National Cable & Telecommunications Association (“NCTA”) hereby submits its comments in the above-captioned proceeding. NCTA is the principal trade association of the cable television industry in the United States. Its members include owners and operators of cable television systems serving more than 90 percent of the nation’s cable television customers, more than 200 program networks, equipment suppliers, and others affiliated with the cable television industry. NCTA’s members also provide high speed access to the Internet and other services.

In the Commission’s Order and Further Notice of Proposed Rulemaking in the above-captioned proceeding,¹ the Commission said that it will determine by January 1, 2005 whether the rule prohibiting cable operators from deploying set-top boxes with integrated security as of July 1, 2006 – the so-called “integration ban” – will “no longer be necessary.” As we demonstrate below, the various rationales underlying the integration ban are no longer valid, and the costs to implement the ban on every cable operator-supplied set-up box are unnecessary and unwarranted. Moreover, the ban places *all* cable operators at a competitive disadvantage to the

¹ *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 7924 (2003) (“2003 Order”).

two DBS providers (which are not subject to similar separate security requirements), despite the fact DirecTV and EchoStar are the second and fourth largest MVPDs, serving more customers than do virtually all cable operators. Therefore, the ban should be eliminated.

INTRODUCTION AND SUMMARY

In 1998, the Commission adopted rules to implement Section 629 of the Communications Act.² The fundamental purpose of Section 629 was to expand the range of equipment options available to customers of multichannel video programming distributors (“MVPDs”) by ensuring that converter boxes and other navigation devices are commercially available from sources other than the MVPD without jeopardizing the security of cable programming and other services. In order to facilitate the development of a retail market, the Commission required MVPDs (with certain exceptions), as of July 1, 2000, to make equipment incorporating only the conditional access functions of navigation devices (*i.e.*, “Point of Deployment” modules, or “PODs”) separately available to their customers.³

These POD modules (now called CableCARDS) would be provided by cable operators to their customers for use in set-top boxes and other navigation devices acquired from vendors other than the MVPD. That commercially-available equipment would contain all of the “non-security” functions normally included in a cable operator-supplied set-top box.

The Commission’s decision to separate security from non-security functions in commercially-available equipment was predicated on the understanding, supported by the cable industry’s experience with pervasive breaches in *analog* signal security, that set-top boxes with embedded security could only provide secure cable services if they were supplied by the cable

² 47 U.S.C. § 629. Section 629 was added by Section 304 of the Telecommunications Act of 1996.

³ *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, Report and Order, 13 FCC Rcd 14775, 14806 (¶ 76) (1998) (“1998 Order”).

operator. It was determined that if boxes were to be sold at retail, the security function needed to be separated out in order to prevent rampant piracy.

In addition to the decision to separate security from non-security functions in commercially-available equipment, the Commission, by divided vote, also mandated that cable operators themselves cease deploying by January 1, 2005, new navigation devices (*e.g.*, set-top boxes) that perform both security and other functions in a single integrated. The operator would have to provide cable customers two components to receive cable service: (1) a separate security POD module⁴ and (2) a device performing non-security functions that would operate with the POD (*i.e.*, a “Host” device).

The Commission majority required *all* boxes sold or leased by a cable operator to separate security and non-security functions by January 1, 2005 (later extended to July 1, 2006).⁵ The rationale for requiring cable operators to separate security in the set-top boxes they provided their customers (thereby prohibiting them from selling or leasing integrated boxes) was to level the playing field between operators and retailers. Both operators and retailers would have to use POD-enabled equipment for the sake of parity. In barring deployment of integrated boxes by operators after 2005, then-Commissioner Powell recognized the harm of denying consumers the option of leasing a less expensive integrated box.⁶ But, the Commission majority concluded that the integration ban was the only way to achieve the commercial availability goals of the 1996 Act.

The FCC adopted this protective measure when digital technology was still nascent and the debate over the development of a retail market for navigation devices was marked by a

⁴ PODs are now called CableCARDs. Because the Commission’s rules were adopted before the term CableCARD was in use, NCTA will use both designations in this filing depending on the context.

⁵ *1998 Order*, 13 FCC Rcd at 14793; *2003 Order*, 18 FCC Rcd at 7926.

⁶ *1998 Order*, Statement of Commissioner Michael K. Powell.

variety of unknown factors, including the cost of separated security; the level of cable operator commitment to retail availability; the readiness of consumer electronics (CE) manufacturers to build working hosts; the impact of DBS on cable and the retail market; and the consumer's desire for retail versus leased equipment. Five years later, we are no longer in the dark.

Indeed, in the intervening years, the cable-consumer electronics landscape has fundamentally changed. Two particular events have undermined the whole basis for the integration ban. First, in 2001, the cable industry changed its position with regard to the security of integrated boxes provided at retail. With greater industry confidence in the signal security that could be achieved in the digital environment (as opposed to the well-documented security problems in the analog world), the industry committed to supporting integrated digital boxes sold at retail. Under this initiative, consumers would be able to obtain an integrated set-top box at retail with the assurance that it will be supported by their cable operator.

Second, and more importantly, in 2002, the cable and consumer electronics industries entered into a landmark agreement that set the stage for a national "plug and play" standard between digital television products and digital cable systems. Perhaps most important, the Commission followed up with regulations in September 2003,⁷ assuring cable customers that they could buy digital TVs and other devices that connect to digital cable systems without a set-top box, and enjoy easy access to high definition television and other services offered by cable operators. The rules also assured consumers that cable operators would provide them with PODs that would work in their POD-enabled equipment.

⁷ *Implementation of Section 304 of the Telecommunications Act of 1996*, CS Docket No. 97-80, PP Docket No. 00-67, Second Report and Order and Second Further Notice of Proposed Rulemaking, FCC 03-225, released October 9, 2003 ("*Plug and Play Order*").

While the integration ban was adopted at a time when the cable and CE industries were at odds on a number of compatibility issues, the plug and play rules are grounded in a cooperative, inter-industry effort whose aims include the development of a retail market for cable-ready digital equipment. A major impetus for this effort is the recognition by cable operators that a retail presence for them is vital in their competition with DBS and that “digital cable ready” POD-enabled devices will provide that presence. But, to make the effort effective, these devices must work on cable systems.

In its review of the retail set-top box market in 2000, the Commission asked whether the 2005 date for the phase-out of integrated boxes remains appropriate, and, what, if any, incentives the ban creates for the development of a commercial retail market for navigation devices. It also asked about the economic impacts and costs associated with the requirement. NCTA presented substantial record evidence in that proceeding and, for a variety of reasons, even more applicable today, urged the Commission to eliminate the ban.⁸

Proponents of the ban argued that the Commission needed to keep the ban in place not only to maintain a level playing field between operators and retailers but also to ensure that operators will make devices sold at retail work with operators’ PODs and cable systems.⁹ The retailers emphasized that unless operators were required to rely on the POD for their own set-top boxes, there was no assurance that retail devices would work with operator-supplied PODs.¹⁰

⁸ See e.g., NCTA Comments, filed in CS Docket No. 97-80, at 30 – 32 (November 15, 2000) (integration ban reduces competition, consumer choice and product innovation); Report of the National Cable & Telecommunications Association Regarding the Significant Costs to Consumers Arising From the 2005 Ban on Integrated Set-Top Boxes, filed in CS Docket No. 97-80 (June 4, 2002) (“*NCTA Cost Report*”); Ex Parte Letter from Neal Goldberg, NCTA, to Marlene Dortch, Secretary, FCC, filed in CS Docket No. 97-80 (June 4, 2002).

⁹ See Ex Parte Filing of Consumer Electronics Retailers Coalition Re Retention of POD Reliance, CS Docket No. 97-80 (March 20, 2003).

¹⁰ *Id* at 2. Without a trace of irony, this filing asserts that “[t]he 2005 reliance date provides a market, rather than a regulatory, mechanism to assure consumer and manufacturer confidence in POD-reliant devices.” There is

In its 2003 Order, the Commission extended the time for implementing the integration ban. Rather than focus on the “parity” or “reliance” rationales previously advanced by the Commission or the retailers, the Commission focused instead on the “evolving nature” of the ongoing negotiations between the cable and consumer electronics industries on technical specifications for unidirectional and bidirectional digital cable products, and the imminent business ordering and manufacturing cycles facing cable operators and CE manufacturers in anticipation of the pending 2005 integration ban. Assuming continuation of the ban would have a positive influence on the cable-CE negotiations, the Commission declined to eliminate the ban, but instead extended the deadline until July 1, 2006.¹¹

The Commission stated that this eighteen month extension should provide “adequate time for the parties to complete their ongoing negotiations and for the Commission to make a more knowledgeable decision as to any further changes in the compliance date.”¹² At the same time, the Commission initiated this rulemaking to reassess, by January 1, 2005, the state of the navigation devices market and to determine whether the designated time frame remains appropriate or whether the ban on integrated devices “will no longer be necessary” and, therefore, should be eliminated.¹³

The time has now come to eliminate the ban. The underlying rationales for the ban no longer exist. The progress the Commission has sought in the development of a retail market is rapidly occurring. And the record shows that maintenance of the integration ban limits consumer choice and imposes unnecessary additional costs on both operators and consumers. Furthermore,

hardly a *more regulatory* approach than mandating the type of equipment a cable operator must provide to his customers, thereby limiting consumer choice while raising consumer costs.

¹¹ 2003 Order, 18 FCC Rcd at 7926.

¹² *Id.*

¹³ *Id.*

continuation of the ban in an environment where cable operators face vigorous competition from two national DBS providers – who are not subject to the separation requirement or the integration ban and have complete control over the manufacture, sale and distribution of their customer equipment – is unfair and unsound public policy.

I. SINCE THE 1998 INTEGRATION BAN WAS ADOPTED, CIRCUMSTANCES HAVE CHANGED DRAMATICALLY, AND THE RATIONALES FOR THE BAN NO LONGER EXIST

A. The Cable Industry’s 2001 Retail Initiative For Integrated Boxes Changed the Factual Basis Underlying the Ban

When the integration prohibition was adopted, the focus was on analog set-top box equipment, which had proven over many years to be highly vulnerable to signal theft. For that reason, there were legitimate concerns about maintaining security of integrated analog set-top boxes if consumers were permitted to purchase them at retail. As a result, the integration ban was based on the assumption that – without such a prohibition – integrated devices would be available only through the cable operator. The Commission majority explicitly justified its decision to impose the ban on the basis that “allowing MVPDs the advantage of being the only entity offering bundled boxes [*i.e.*, integrated boxes with embedded security] could adversely affect the development of this equipment market,” and that accordingly “the prohibition on integrated boxes allows for equal competition in the marketplace.”¹⁴

However, integrated *digital* set-top boxes do not present the same theft-of-service threat as *analog* devices. With the anticipated widespread adoption of digital equipment, the cable industry changed its position in 2001 and committed to allow the very same integrated digital set-top boxes provided by cable operators to be made available to consumers through

¹⁴ *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, Order on Reconsideration, 14 FCC Rcd 7596, 7610 (1999)(“*Reconsideration Order*”).

independent retail outlets.¹⁵ While the results of this initiative have been disappointing – presumably because of economic factors – by allowing retailers to sell integrated devices that are identical to those the operator leases, the cable industry’s commitment to support the retail sale of integrated devices calls into question the original “parity” rationale for the ban.

B. The MSO-CE Plug and Play Agreement and the Commission’s Implementing Rules Undermine Any Remaining Rationales For the Integration Ban

The cable industry’s voluntary retail initiative was only the first step toward a full-scale retail market for digital cable products. The cable-consumer electronics “plug and play” agreement represented a major breakthrough in relations between the two industries and the establishment of standards for “digital cable ready” products. The Commission’s implementing rules solidify this effort by imposing *legal obligations* on cable operators to facilitate the commercial availability of “digital cable ready” equipment. These rules should eliminate concerns that unless cable operators deploy POD-enabled equipment, there can be no assurance cable operators will make commercially-available, POD-enabled devices work on their systems.

First, the FCC’s rules prescribe technical standards to ensure that subscribers are able to fully enjoy the functionalities of unidirectional digital cable ready products as well as the digital services offered by their cable operator. Under the transmission standards, digital cable systems with an activated channel capacity of 750 MHz or greater are required to adhere to certain technical requirements involving the digital cable network interface and the digital video service multiplex and transport system.¹⁶ Among other things, these requirements standardize certain attributes of digital cable system transmissions, thereby facilitating the direct connection of

¹⁵ See Ex Parte Letter from Robert Sachs, President and CEO, National Cable & Telecommunications Association to the Honorable Michael K. Powell, Chairman, Federal Communications Commission, filed in CS Docket No. 97-80 (October 10, 2001).

¹⁶ *Plug and Play Order* at ¶ 17.

unidirectional digital cable televisions and products to cable systems nationwide and they require provisioning of PODs by *all* digital cable systems.¹⁷ As the Commission recognized, most large cable systems already comply with these standards and other operators have begun implementing these standards at their headends and in their networks.¹⁸

Second, as the Commission anticipated in the *Plug and Play Order*, the POD provisioning requirements in the rules reflect that unidirectional digital cable televisions and products represent the first widespread implementation of POD and POD-Host interface technology in the marketplace.¹⁹ Under the rules, all digital cable systems are required to maintain an adequate supply of PODs and ensure convenient access to such PODs for their customers by July 1, 2004.²⁰ In addition, all digital cable systems are required to conform to technical standards governing POD-Host interfaces and the POD copy protection system.

These requirements further implement the Commission the mandate to ensure the commercial availability of navigation devices.²¹ In requiring digital cable systems to support POD-enabled devices, the rules supercede the rationale proffered by the retailers for retaining the ban – that only if operators are required to rely on PODs themselves, then and only then will retailers and consumers be assured that POD-enabled devices sold at retail will work on cable systems. Cable operators are now obligated, as a matter of law, to make them work.

¹⁷ *Id.* See 47 C.F.R. § 76.640 (“Support for Unidirectional Digital Cable Products on Digital Cable Systems”); 76.640(b)(Provisioning of PODs required by *all* digital cable systems); 76.640(b)(2) (*All* digital cable systems must comply with SCTE 28 2003, the POD-Host Interface Standard, and SCTE 41, 2003, the POD Copy Protection System); 76.640(b)(1) (technical requirements for digital cable systems with activated channel capacity of 750 MHz or greater).

¹⁸ *Plug and Play Order* at ¶ 17.

¹⁹ *Plug and Play Order* at ¶ 19 (As the FCC acknowledged, “[w]e believe that these new requirements will further the Commission’s mandate to ensure the commercial availability of navigation devices and facilitate the adoption and implementation of both unidirectional digital cable products and the POD-Host interface platform.”)

²⁰ *Id.*

²¹ *Plug and Play Order* at ¶ 55.

As the cable and consumer electronics companies said at the time the agreement was announced, a plug and play standard would not only make it easier for cable consumers to access digital TV services and thereby speed the transition, but “will help cable operators establish a strong presence in the *retail* market.”²² The Commission’s endorsement of the MSO-CE Plug and Play Agreement and its adoption of implementing rules with the force of law eliminates any doubt as to cable’s commitment to a retail market and to making retail navigation devices work on their systems. The Agreement and the FCC’s rules obviate the need for the costly, consumer unfriendly integration ban which arguably served that purpose.

C. Cable Operators Have Every Incentive to Make Commercially-Available, POD-Enabled Products Work, One-Way Products are About to Hit the Market and Negotiations on Two-Way Products are Underway

In deciding not to eliminate the ban last year, the Commission indicated that it would look to “future developments” in both the marketplace and ongoing industry negotiations in evaluating its continued usefulness.²³ As NCTA set forth in its recent status report on implementation of the plug and play agreement, there has been significant progress toward a retail market for unidirectional digital cable ready products, and negotiations for specifications for bi-directional digital cable products are underway.²⁴

In particular, consumer electronics manufacturers, such as Panasonic, Pioneer and Samsung, displayed unidirectional digital cable ready products at the recent Consumer

²² CEA and NCTA Joint Press Release, “Cable and Consumer Electronics Companies Reach Key Agreement on Digital TV Transition Issues,” December 19, 2002 (emphasis added).

²³ *2003 Order*, 18 FCC Rcd at 7926.

²⁴ See Status Report of the National Cable & Telecommunications Association, CS Docket No. 97-80, filed January 21, 2004.

Electronics Show (CES) in Las Vegas.²⁵ Motorola has shipped CableCARDS to MSOs and also plans to launch several “CableCARD”-enabled products this year, including set-top boxes that support HDTV and PVR functions. The emergence and deployment of these CableCARD-enabled products concretely demonstrates the commitment of both the cable and consumer electronics industries to speed the deployment of new digital cable ready products at retail.

The negotiations on two-way digital cable ready products are underway in response to the Commission’s adoption of the plug and play rules and industry follow-up to the Commission’s Order. The parties have heeded the concerns of other industries and companies by reaching out individually and jointly to third parties. Both the cable and consumer electronics industries are seeking input from these third parties on the key components of a two-way digital cable ready framework and the means to achieve a rapid agreement between the cable and CE industries while taking into account the interests of other industries that would potentially be directly affected by such a two-way agreement.

As described in NCTA’s January 21, 2004 status report, among other things, the following steps have been taken to facilitate production of both one-way and two-way digital cable ready devices:

- The release by CableLabs of the DFAST license as set forth in the December 2002 Memorandum of Understanding between the cable and CE industries. The DFAST license provides manufacturers with intellectual property needed to build plug and play devices that will accommodate a separate security module (*i.e.*, the CableCARD).
- CableLabs has finalized arrangements with a Public Key Infrastructure (PKI) management company to issue and administer digital certificates that are embedded in unidirectional digital cable products (UDCPs) and enable CableCARDS and UDCPs to operate in a secure manner.

²⁵ These products are being built pursuant to either CableLabs’ OpenCable specifications (and its POD-Host Interface License Agreement) or the specifications codified in Commission rules in the “Plug and Play” Order (and the related Joint Test Suite and DFAST intellectual property license).

- Cable operators are ahead of the Commission's schedule, set forth in the plug and play Order, in ascertaining whether their systems will support UDCPs. MSO technical representatives coordinated closely among themselves and with their equipment vendors, resulting in four major metropolitan areas having been successfully tested for compliance to support UDCPs. Information gathered from these market trials will help facilitate the speedy upgrade of additional cable systems.
- CableLabs Go2Broadband service, which is the Internet-based electronic commerce tool that assists affiliated computer makers, retailers and content providers in identifying what cable services are available at an address and linking them directly with the operator, has been updated with the capability to identify cable systems that support UDCPs in order to enhance the retail availability of such devices. Similar updates to Go2Broadband can now readily be made for two-way product launches.
- Over the past six months, 30 major manufacturers of digital televisions and related products have utilized CableLabs' state-of-the-art testing facilities, including headend equipment, test tools, and personnel to help evaluate and develop their CableCARD-enabled products. To date, two large manufacturers have had a total of seven models of digital television sets certified as OpenCable compliant. As a result of the testing and certification process, a leading consumer electronics store has had available approximately 5,000 new OpenCable DTV receivers.
- As noted above, at the CES, major CE companies exhibited ready-to-market CableCARD-enabled unidirectional DTV products.

Although the two-way digital cable-ready product specifications are still being negotiated, one manufacturer, Panasonic, has already demonstrated a two-way interactive digital television set using the OpenCable Application Platform or "OCAP." At the recent CES, the President of Panasonic Technologies Company, Paul Liao, said "we're on a fast track to develop OCAP compliant systems, which will allow us to produce TVs that will support all of cable's interactive services without the use of a set-top box. . . . Consumers will be able to buy digital

cable-ready TVs – and with the use of a CableCARD, they will be able to receive digital services no matter which cable system in the country they subscribe to.”²⁶

In 2004, CableLabs will continue working with manufacturers in testing products that are built to conform to the OpenCable specifications as well as unidirectional digital cable products as defined in the Commission’s *Plug and Play Order*. Manufacturers have, for example, been invited to participate in “practice run” testing and lab time at CableLabs and five testing events (or “test waves”) have been scheduled this year.

On the consumer side of the equation, cable operators recognize the importance of ensuring that consumers have a full understanding of UDCPs in order to minimize the potential for confusion regarding the capabilities of “digital cable ready” devices. NCTA has worked with cable operator representatives and CableLabs to complete a set of frequently asked questions that may be used by customer support representatives to inform cable customers of the capabilities of UDCPs, and provide consistent answers to anticipated queries consumers may have when calling their local cable operator help-desk for support. Additionally, the cable industry has partnered with the CE industry to develop a common logo that will facilitate consumer awareness of “Digital Cable Ready” (“DCR”) and “Interactive Digital Cable Ready” (“iDCR”) devices.

The introduction of unidirectional digital cable ready products and the ongoing two-way negotiations have received nationwide attention. In a year-end technology review, a New York Times columnist recently singled out the cable industry’s development of the CableCARD as a major technological achievement in 2003.²⁷

²⁶ Panasonic Press Releases, “Panasonic Demonstrates World’s First Interactive, OCAP-Based Cable System,” January 8, 2004; Panasonic Introduces CableCard Ready DLP HDTV Projection Televisions,” January 7, 2004.

²⁷ “State of the Art; Taking their Lumps of Coal,” David Pogue, The New York Times, December 25, 2003.

The Commission's adoption of critical provisions of the MSO-CE agreement sent a positive signal to all industries involved in the DTV transition to work together to voluntarily resolve outstanding issues. With the plug and play rules now in place, and testing of unidirectional digital cable products imminent, the cable and consumer electronics industries are now proceeding to build on their early two-way discussions toward reaching agreement on specifications for two-way digital cable ready devices.

Cable operators have applauded these efforts since they provide the cable industry with a significant retail presence for the first time. Such a presence is critical for cable operators to compete more effectively with DBS providers, whose tremendous success in the MVPD marketplace has been largely predicated on the well-established national retail availability of their equipment and service offerings. It would make no sense for cable operators to have worked so long and hard to secure such a retail presence for "digital cable ready" products and then not make certain such POD-enabled products work on their systems. That is incentive enough to make sure POD-enabled products work on cable systems and to rapidly complete the two-way negotiations. Indeed, the two-way products which are the subjects of those talks will provide access to cable's most innovative advanced services, such as Video on Demand (VOD) and Interactive Program Guides (IPGs). Again, operators have every incentive to finish these discussions and have those products brought to market. Therefore, to the extent the integration ban was maintained to "hold cable's feet to the fire" in implementing the one-way Plug and Play Agreement and in negotiating a two-way agreement, it is unnecessary.

II. THE INTEGRATION BAN WOULD LIMIT SUBSCRIBER CHOICE AND UNNECESSARILY INCREASE COSTS

As described above, none of the rationales for retaining the ban exist today. But it is also evident from the record that imposition of the ban would harm consumers who might otherwise

benefit from a variety of equipment options. As Chairman Powell observed in dissenting to the adoption of the ban in 1998, it “is contrary to good public policy to remove from the market a potentially cost-effective choice for consumers.”²⁸ In affirming to the Commission’s integration ban, the D.C. Circuit also recognized, as a matter of sound public policy, that:

Consumers might have chosen not to purchase retail devices for perfectly sensible economic reasons – because, for instance, there are efficiency gains captured in the manufacture of an integrated box that lead it to cost less than the combined cost of seeking a separate security module and a retail device, or because consumers view as too high the transaction costs of seeking a separate ancillary device at retail. If this is the case, the integration ban does nothing more than deny the most cost-effective product choice to consumers – an ironic outcome for an order implementing “one of the most pro-consumer provisions of the Telecom Act.”²⁹

The court expressed these concerns about the integration ban at a time when retailers could not, as they can today, sell integrated digital set-top boxes themselves and when there were no plug and play rules in place to foster the establishment of a retail market. So, plainly, the court’s comments carry even more weight today.

Eliminating the ban will enable consumers either to purchase a CableCARD-enabled Host set-top box or other POD-enabled product at retail or to lease an integrated box from the cable operator, depending on which option best fits the consumer’s particular needs and preferences. There is ample record evidence showing the potential cost advantages and other benefits that operator-supplied integrated set-top boxes offer to consumers.³⁰ In NCTA’s *Cost*

²⁸ *Reconsideration Order*, 14 FCC Rcd at 7632 (Statement of Commissioner Powell).

²⁹ *General Instrument Corp. v. FCC*, 213 F.3d 724, 731-32 (D.C. Cir. 2000). The 2002 House Telecommunications Subcommittee’s DTV Transition staff discussion draft makes the same point in proposing elimination of the integration ban. As then Chairman Tauzin recognized in his opening statement during the hearing on the draft: “[i]ntegrated boxes may very well be more convenient and less expensive for consumers – at the very least, there is another choice for consumers.” Statement of Chairman W.J. “Billy” Tauzin before the House Energy and Commerce Subcommittee on Telecommunications and the Internet (Sept. 25, 2002).

³⁰ See, e.g., *NCTA Cost Report*, filed in CS Docket No. 97-80, at 6-7 (Aug. 2, 2002). See also *NCTA Ex Parte*, filed in CS Docket No. 97-80 (Jan. 7, 2003) (including declarations that detail the added cost of POD-Host combinations).

Report, filed August 2, 2002, we demonstrated that the POD-Host combination would then cost cable operators approximately \$72 to \$93 more than an integrated set-top box performing the same functions and that this additional cost translated into an average consumer price increase of between approximately \$2.00 and \$3.00 per month for each leased POD-Host combination.³¹ The retailers challenged these figures in their *ex parte* filings in response to NCTA's report.³² But, even using the cost figures alleged by retailers – which NCTA continues to believe substantially understate the added costs associated with a POD-Host combination – implementation of the ban on integrated set-top boxes would impose hundreds of millions of dollars in additional equipment costs on consumers.³³

Some consumers may prefer a less expensive integrated set-top box offered by a cable operator;³⁴ others may prefer a POD-enabled Host device that has particular features they desire which might be offered by a retailer. But this choice is eliminated by the integration ban. The ban would force *all* cable subscribers to bear additional costs for a POD-Host combination for *every new set-top box* in the house, even though the enhanced portability enabled by a POD provides no added value for customers who prefer to lease, rather than purchase, their equipment. Those boxes would stay within one operator's cable system.

³¹ *NCTA Cost Report* at 4-7.

³² See CERC Ex Parte, filed in CS Docket No. 97-80 (Aug. 15, 2002).

³³ *Id.* See also *NCTA Cost Report* at n.13 (Aug. 2, 2002) (noting that the integration ban would require the eventual replacement of over 32 million integrated digital set-top boxes). And these costs would be borne by consumers with no corresponding public interest benefit. Commissioner Copps recognized that imposition of the ban would have forced cable customers to lease “costlier devices” – at least in the short term. *2003 Order*, Concurring Statement of Commissioner Michael J. Copps.

³⁴ Indeed, Chairman Powell's DTV transition plan expressly recognized the potential consumer appeal of equipment that incorporates various functions into a single integrated device. Specifically, his plan encouraged cable operators, as of January 1, 2003, to provide to subscribers (for lease or purchase) a single, integrated set-top box (as opposed to a standard digital set-top box and a separate HD “side car”) that allows for display of HDTV programming. The cable industry committed to complying with this single-box alternative, see Letter from Robert Sachs, President and CEO, NCTA to the Honorable Michael K. Powell, Chairman, FCC (May 1, 2002) at 2. For similar reasons, those consumers who find a single integrated set-top box more appealing than separate CableCARD and Host devices should not be deprived of that option.

The loss of potentially cost-effective product choices for consumers is only compounded by the potential dampening of consumer enthusiasm for digital services as a result of the additional costs associated with deploying only non-integrated digital equipment. The cable industry is nearing completion of an intensive infrastructure upgrade and the reduction in capital expenditures will allow it to focus on vital new services. The significant and unnecessary additional capital costs that the integration ban imposes on the cable industry would jeopardize the capital outlays needed to support new services – such as video-on-demand and interactive program guides – that will benefit consumers and promote the digital transition.

In sum, the optimal public policy is to ensure that consumers can choose the cable equipment option that best fits their preferences. As Chairman Powell has observed, the ban on integrated devices forces cable operators to make procurement and technology decisions “so as to avoid the potential for stranded investment, not on the basis of what might be best for their consumers.”³⁵ By contrast, if the ban is eliminated, cable equipment investments and consumer equipment prices will be driven by consumer choice and competition. As the Commission acknowledged in the *Plug and Play Order*, “[i]t is our belief that once a baseline compatibility standard has been set, marketplace forces are best suited to decide which products and services will meet consumers’ needs and interests.”³⁶

III. RETAINING THE INTEGRATION BAN WOULD PERMIT DIRECT BROADCAST SATELLITE PROVIDERS NOT SUBJECT TO THE RULE TO UNFAIRLY COMPETE WITH CABLE OPERATORS

In a highly competitive video programming marketplace, the integration ban puts a thumb on the scale in favor of one competitor over another. This is because cable operators are subject to the restraints of the integration ban and the separate security requirement for all of

³⁵ *Reconsideration Order* at 7632 (Statement of Commissioner Powell).

³⁶ *Plug and Play Order* at ¶ 29.

their customers, while the Commission's rules exempt DBS from both requirements for their customers.³⁷

As the Commission recognized in its recently-adopted Tenth Annual Report on the state of competition in the video programming market, "DBS has become the most significant national competitor to cable. Today, most consumers have the choice of at least two national DBS providers."³⁸ According to the report, "DBS now serves the second largest share of MVPD subscribers," with DirecTV and EchoStar "each among the five largest providers of multichannel video programming service."³⁹ Unlike cable, DBS has the freedom to control the manufacture, sale and distribution of satellite receivers and systems. In a recent interview, News Corporation Chairman and CEO Rupert Murdoch presaged a later announcement by DirecTV (now owned by News Corporation) on its hardware strategy: "our main move is to have one box, which EchoStar has. One box which we will design, albeit with the best brains we can find from all these companies. And we will put that out to tender . . . so we can get all the possible benefits of mass manufacturing."⁴⁰

In Mr. Murdoch's view, there would be one standardized DirecTV high definition box, one digital video recorder box, and one "slave" box for second sets.⁴¹ He went on to say:

[O]ur greatest worry is at the moment there are about 120 different DirecTV boxes out in the market today. And we have to work through that with churn and

³⁷ 47 C.F.R. § 76.1204(a)(2). The navigation device rules have the effect of standardizing equipment used to access cable services on the theory that that will permit portability across systems and hence commercial availability of such devices. The non-applicability of these rules to DBS is particularly ironic and unfair in light of the fact that DBS customer equipment is not portable across different providers' systems, *i.e.*, DirecTV customer equipment does not work with on EchoStar's system and vice versa.

³⁸ Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 03-172, ¶ 5, released January 28, 2004 ("*Video Competition Report*").

³⁹ *Id.* at ¶ 5 and 16. In fact, DirecTV and EchoStar are two of the four largest MVPDs. See *Video Competition Report*, Appendix B, Table B-3.

⁴⁰ "Murdoch Outlines DirecTV's Future," *Satellite Business News*, December 31, 2003, at 10.

⁴¹ *Id.*

things, so there's as few legacy boxes as possible in three or four years time. So when we advertise a great new service, it may only be possible for that to come through one of these new boxes.⁴²

At the recent Consumer Electronics Show, DirecTV unveiled its new hardware and distribution strategy aimed at offering a “simple solution for both customers and retailers.”⁴³ Under the new strategy, beginning in mid-2004, DirecTV will “assume complete responsibility for the sale and distribution to retail of all DirecTV set-top boxes used to receive DirecTV programming and services.”⁴⁴ The announcement goes on to state that “over the course of the year, authorized manufacturers of DirecTV hardware will migrate to a new standardized hardware specification, which will ensure that all DirecTV customers enjoy a consistent user interface and experience. Similarly, the various consumer electronics brands currently associated with DirecTV equipment will be replaced by the DirecTV brand.”⁴⁵ As explained by Steve Cox, Executive Vice President, Sales Distribution and Marketing at DirecTV, “we believe that this new hardware strategy will not only offer a significantly simplified solution for DirecTV customers, but it will also deliver a more effective and seamless supply-chain process for the vast network of DirecTV retailers.”⁴⁶

While DBS operators are armed with unfettered control over their equipment from manufacture to retail sale, allowing greater efficiency and flexibility to better serve their growing customer base, the integration ban would constrain cable operators to a distribution strategy that encompasses only one form of equipment: dual components separating security and non-security

⁴² *Id.*

⁴³ DIRECTV Press Release, “DIRECTV Debuts New Hardware Strategy at CES 2004,” January 8, 2004. *See also* “DIRECTV Formally Slates Distribution Restructuring,” Satellite Business News Fax Update,” January 9, 2004.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

functions. And that rule applies to *all* cable operators despite the fact that DirecTV and EchoStar, as the second and fourth largest MVPDs, respectively, service more customers than virtually all cable operators.⁴⁷ Cable operators should be freed of the integration ban so that they may provide a choice of affordable integrated security equipment to those customers who prefer to use such equipment.⁴⁸ While it is unlikely the Commission will impose “plug & play” requirements on DBS or mandate that any manufacturer has the right to build “DBS ready” equipment, the FCC can take a major step in leveling the playing field by eliminating the integration ban.

CONCLUSION

The 1998 Navigation Device Order concluded that the only way to establish a “level playing field” between retailer and operator-supplied boxes was to require every operator-supplied box to have separate security. That judgment was reached when there was no possible retail market for integrated set-top boxes and when cable operators’ commitment to the retail sale of cable equipment generally was arguably less clear. This situation has now changed.

Retailers may now offer digital integrated set-top boxes to consumers. Moreover, the MSO-CE plug and play agreement’s key provisions recently codified in the Commission’s rules assure manufacturers and retailers that digital television receivers and other POD-enabled

⁴⁷ *Video Competition Report* at Appendix B, Table B-3.

⁴⁸ To be clear, NCTA is not suggesting that cable operators should be freed from the separation requirement, only from the integration ban. As such, cable operators would continue to be subject to greater commercial availability restrictions than DBS operators, which, as noted, are exempt from *both restrictions*. The Commission should recognize that such continued commitment by the cable industry to the OpenCable standards process for POD-Host combinations means that greater competition among a larger number of diverse equipment providers is facilitated under this open process than is the case under the current DBS process, in which the DBS operator has complete control over equipment design and production and over the selection of the particular manufacturer(s) that will be authorized to build such equipment. However, given the lack of any rationale or justification for the integration ban in light of changed marketplace circumstances and the significant costs it would impose on consumers and cable operators (which do *not* apply at all to DBS or its customers), NCTA strongly urges the Commission to level the playing field between cable and DBS at least by eliminating the integration ban.

devices will be fully supported by cable operators. And the cable industry's desire for a retail presence and to make certain their services (especially new two-way services) can be accessed by their customers with POD-enabled retail products, also assures that they will make those products work on their systems.

In light of the vastly changed circumstances since the ban was adopted, the Commission should recognize that the rationales for the ban no longer exist and that continuation of the ban will only limit subscriber choice, increase costs, and adversely impact competition in the video marketplace. The ban should, therefore, be eliminated.

Respectfully submitted,

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